

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

SERGIO BARAJAS MORENO, )  
 ) CASE NO. C09-1725-RSL  
Petitioner, )  
 )  
v. )  
 ) REPORT AND RECOMMENDATION  
A. NEIL CLARK, Field Office Director, U.S. )  
Immigration and Customs Enforcement, )  
 )  
Respondent. )  
\_\_\_\_\_ )

I. INTRODUCTION AND SUMMARY CONCLUSION

On December 18, 2009, petitioner Sergio Barajas Moreno, proceeding pro se, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, challenging the lawfulness of his continued detention without bond pending the completion of his removal proceedings before the Immigration Court. (Dkt. No. 6.) On January 20, 2010, the government filed a Return Memorandum and Motion to Dismiss, arguing that the nature of the charges of removability against petitioner warrant mandatory detention under Section 236(c) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1226(c). (Dkt. No. 11.) Petitioner subsequently filed a Traverse Motion, indicating that the Board of Immigration Appeals

01 (“BIA”) had dismissed his appeal and that he had timely filed a Petition for Review of the  
02 BIA’s decision with the Ninth Circuit Court of Appeals and was granted a temporary stay of  
03 removal. (Dkt. No. 17.) Petitioner maintains that he is entitled to a custody hearing before an  
04 Immigration Judge (“IJ”) pursuant to INA § 236(a), 8 U.S.C. § 1226(a). *Id.* On April 8,  
05 2010, however, petitioner received a bond hearing before an IJ who ordered that petitioner be  
06 released from custody under bond of \$10,000. (Dkt. No. 22, Ex. A.) The government now  
07 asserts that because petitioner has received the relief sought in his habeas petition, his petition  
08 should be denied and dismissed as moot. (Dkt. No. 22.)

09 For the reasons set forth below, the Court recommends that respondent’s motion to  
10 dismiss be GRANTED, petitioner’s traverse motion be DENIED, and this matter be dismissed  
11 with prejudice.

## 12 II. BACKGROUND AND PROCEDURAL HISTORY

13 Petitioner is a native and citizen of Mexico who was admitted to the United States as a  
14 lawful permanent resident on June 24, 1981. (Administrative Record (“AR”) R15.) On June  
15 24, 2008, petitioner was convicted in the State of California for the offense of possession of a  
16 controlled substance (methamphetamine), and was sentenced to one year and four months  
17 incarceration. (AR L161.) On April 7, 2009, petitioner was transferred from the California  
18 Department of Corrections to ICE custody and detained without bond pursuant to INA § 236(c).  
19 (AR R153, L146-47.) The same day, ICE served petitioner with a Notice to Appear, charging  
20 him as subject to removal under INA § 237(a)(2)(B)(i), for having been convicted of a violation  
21 relating to a controlled substance. (AR L148-50.)

22 Petitioner requested and received a bond redetermination hearing before an IJ, who

01 denied bond for lack of jurisdiction pursuant to INA § 236(c). (AR L189.) On November 3,  
02 2009, the IJ denied petitioner's applications for a Section 212(c) waiver and cancellation of  
03 removal under INA § 240A(a), and ordered him deported to Mexico on the charges contained in  
04 the Notice to Appear. (AR L277-85.) On November 30, 2009, petitioner timely appealed the  
05 IJ's decision to the BIA. (AR R234, L274-76.)

06 On December 18, 2009, petitioner filed the instant habeas petition in this Court,  
07 challenging his continued detention without bond. (Dkt. No. 6.) Petitioner requests "[t]hat  
08 the Court order the Petitioner to be released on supervised release pending all finality or that the  
09 court orders the Agency to hold a bond hearing where individual factors can be considered that  
10 can allow for the release of the Petitioner pending the conclusion of his legal matters with ICE  
11 and the District Courts and the Ninth Circuit." *Id.* at 2. On January 20, 2010, respondent filed  
12 a Return Memorandum and Motion to Dismiss, arguing that petitioner remains in removal  
13 proceedings and that the nature of the charges of removability against petitioner warrant  
14 mandatory detention under Section 236(c) of the Immigration and Nationality Act ("INA"), 8  
15 U.S.C. § 1226(c).

16 On March 4, 2010, the BIA affirmed the IJ's decision and dismissed petitioner's appeal.  
17 (Dkt. No. 18 at 1.) Accordingly, petitioner's order of removal became administratively final  
18 on that date. *See* INA § 101(a)(47)(B)(i), 8 U.S.C. § 1101(a)(47)(B)(i). On March 5, 2010,  
19 petitioner timely filed a Petition for Review of the BIA's decision with the Ninth Circuit Court  
20 of Appeals. *See Moreno v. Holder*, No. 10-70678 (9th Cir. 2010). Pursuant to Ninth Circuit  
21 General Order 6.4(c)(1)(3), a temporary stay of removal was automatically issued. *Id.*  
22 Petitioner's petition for review remains pending in the Ninth Circuit. *Id.*

01 On April 8, 2010, an IJ held a bond redetermination hearing pursuant to INA § 236(a),  
02 and ordered that petitioner be released from custody on bond in the amount of \$10,000. (Dkt.  
03 No. 22, Ex. A.) Petitioner states that he is eligible for humanitarian release, and requests that  
04 the Court “order the Immigration Judge to conduct an individualized bond hearing.” (Dkt. No.  
05 20 at 4.) Respondent argues that petitioner has received the relief sought through the filing of  
06 his habeas petition and that his claims in this action are now moot and should be dismissed.  
07 (Dkt. No. 22 at 1.)

### 08 III. DISCUSSION

09 Section 236 of the INA provides the framework for the arrest, detention, and release of  
10 aliens in removal proceedings. *See* INA § 236, 8 U.S.C. § 1226. That provision provides the  
11 Attorney General with discretionary authority to determine whether an alien should be  
12 detained, released on bond, or released on conditional parole pending the completion of  
13 removal proceedings, unless the alien falls within one of the categories of criminal aliens  
14 described in Section 236(c), for whom detention is mandatory. *See id.*; *see also Demore v.*  
15 *Kim*, 538 U.S. 510, 513 n.1., 123 S. Ct. 1708, 155 L. Ed. 2d 724 (2003)(“Section 1226(c)  
16 authorizes detention of aliens who have committed certain crimes . . .”). Unlike non-criminal  
17 aliens who are detained under INA § 236(a), criminal aliens detained under INA § 236(c) are  
18 not entitled to a bond hearing and are not provided the opportunity to show that their detention  
19 is unnecessary because they are not a flight risk or a danger to the community. *See*  
20 *Casas-Castrillon v. Dept. of Homeland Sec.*, 535 F.3d 942, 946 (9th Cir. 2008).

21 Once removal proceedings have been completed, the detention and release of aliens  
22 shifts to INA § 241, 8 U.S.C. § 1231. Section 241(a)(1)(A) of the INA states that “when an

alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the ‘removal period’).” INA § 241(a)(1)(A). During the 90 day removal period, continued detention is required. INA § 241(a)(2). Section 241(a)(6) provides the Attorney General with discretionary authority to detain certain aliens beyond the removal period, or to release them under an order of supervision. INA § 241(a)(6). The determination of when an alien becomes subject to detention under Section 241 rather than Section 236 is governed by Section 241(a)(1)(B), which provides:

The removal period begins on the latest of the following:

- (i) The date the order of removal becomes administratively final.
- (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court’s final order.
- (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

INA § 241(a)(1)(B)(emphasis added). Thus, pursuant to INA § 241(a)(1)(B)(ii), where a court issues a stay of removal pending its review of an administrative removal order, the alien continues to be detained under INA § 236(a) until the court renders its decision. *See Prieto-Romero v. Clark*, 534 F.3d 1053,1059 (9th Cir. 2008); *see also Casas-Castrillon*, 535 F.3d at 951.

In the present case, ICE charged petitioner with being removable from the United States for having been convicted of a violation relating to a controlled substance under INA § 237(a)(2)(B)(i). Thus, petitioner falls squarely within the group of aliens described in INA § 236(c)(1)(B) for whom detention is mandatory *during* removal proceedings. On March 5,

2010, however, petitioner filed a petition for review with the Ninth Circuit which issued a stay pending its review of petitioner's administrative removal order. *See Moreno*, No. 10-70678. Because his removal order has been stayed by the Ninth Circuit pending its review of the BIA decision, the removal period has not yet commenced, and petitioner is now detained pursuant to INA § 236(a). *See Casas-Castrillon*, 535 F.3d at 948 (holding that once proceedings before the BIA are completed, the authority to detain criminal aliens shifts from INA § 236(c) to INA § 236(a)); *see also Prieto-Romero*, 534 F.3d at 1062 ("Because Prieto-Romero filed a petition for review and our court entered a stay, his detention is governed by § 1226(a); only if we enter a final order denying his petition for review will the statutory source of the Attorney General's detention authority shift from § 1226(a) to § 1231(a).").

In *Casas-Castrillon*, the Ninth Circuit held that aliens who are in immigration detention pending judicial review of an administratively final order of removal are entitled to an individualized bond hearing before an Immigration Judge regardless of whether they were previously detained under INA § 236(c)(mandatory detention) during removal proceedings. *Casas-Castrillon*, 535 F.3d at 951. The Ninth Circuit held because neither INA § 236(c) nor INA § 241(a) authorizes prolonged detention pending judicial review of a removal order, an alien's detention could only be authorized under INA § 236(a). *Id.* at 948. The Court concluded that that an alien has the right to contest the necessity of his detention before a neutral decision maker and an opportunity to appeal that determination to the BIA. *See id.* at 950-51.

As respondent asserts, however, the record shows that on April 8, 2010, petitioner was provided an individualized bond hearing before an Immigration Judge where he was given the

01 opportunity to present evidence in support of his release. The IJ ordered that petitioner be  
 02 released from custody under bond of \$10,000. Because petitioner has received the relief  
 03 sought in his habeas petition, his petition is now moot and should be dismissed.<sup>1</sup> See  
 04 *Prieto-Romero*, 534 F.3d 1053 (holding that due process is satisfied once an alien has “had an  
 05 opportunity to contest the necessity of his detention before a neutral decisionmaker and an  
 06 opportunity to appeal that determination to the BIA.”); see also *Flores-Torres v. Mukasey*, 548  
 07 F.3d 708, 710 (9th Cir. 2008)(dismissing as moot part of habeas petition challenging detention  
 08 without an individualized bond hearing after IJ held a bond hearing).

#### 09 IV. CONCLUSION

10 For the foregoing reasons, the Court recommends that respondent’s motion to dismiss  
 11 (Dkt. No. 11) be GRANTED, petitioner’s traverse motion (Dkt. No. 17) be DENIED, and that  
 12 this matter be DISMISSED with prejudice. A proposed order accompanies this Report and  
 13 Recommendation.

14 DATED this 18th day of May, 2010.

15 

16 Mary Alice Theiler  
 17 United States Magistrate Judge  
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20 <sup>1</sup> Petitioner argues in his Traverse Motion that he is eligible for “humanitarian release  
 21 under 8 C.F.R. 212.5(b).” (Dkt. No. 17 at 2.) However, 8 C.F.R. § 212.5(b) authorizes ICE to  
 22 grant parole to any alien applying for admission to the United States for “urgent humanitarian  
 reasons” or “significant public benefit.” Because petitioner is not applying for admission to  
 the United States, 8 C.F.R. § 212.5(b) is inapplicable to petitioner’s case. Accordingly,  
 petitioner’s request for humanitarian release pursuant to 8 C.F.R. § 212.5(b) must be denied.